IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 25, 2006

STATE OF TENNESSEE v. JEFFREY ALLEN PHILLIPS

Appeal from the Criminal Court for Sullivan County
Nos. S50,088, S50,089 & S50,090 Phyllis H. Miller, Judge

No. E2005-01709-CCA-R3-CD - Filed June 5, 2006

The defendant, Jeffrey Allen Phillips, appeals the Sullivan County Criminal Court's judgment denying alternative sentencing. The record evinces no basis for disturbing the criminal court's determinations, and we affirm the judgments.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Stephen M. Wallace, District Public Defender; and Andy Kennedy, Assistant District Public Defender, for the Appellant, Jeffrey Allen Phillips.

Paul G. Summers, Attorney General & Reporter; Leslie Price, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Ricky Curtis, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The transcript of the defendant's guilty plea submission hearing contains the prosecutor's summary of the factual bases for the conviction offenses. On July 25, 2004, an officer stopped the car driven by the defendant and determined that the defendant was subject to an order declaring him a habitual traffic offender (HTO). On September 13, 2004, the defendant failed to appear in court on the resulting charge. On December 19, 2004, the defendant was arrested for driving under the influence (DUI) and again for violating the HTO law. The defendant's blood-alcohol content following this arrest was .19 percent.

The defendant pleaded guilty to the resulting charges, as follows:

Case	Offense	Class	Range	Sentence	Alignment

S50,088	HTO	E felony	II	30 months	consecutive to S50,089 and S50,090
S50,089	Failure to appear	E felony	II	2 years	consecutive to S50,088 and S50,090
S50,090(1)	HTO	E felony	II	2 years	concurrent to count (2), S50,090; consecutive to other charges
(2)	DUI	Class A misdemeanor	N/A	11 months, 29 days	concurrent to count (1); consecutive to other charges.

Thus, the plea agreement, which was approved by the court, resulted in a six and one-half years' sentence, but the effective length of the sentences to be served in confinement was four and one-half years because the effective sentence in indictment number S50090 was suspended upon serving the remaining sentences. The defendant submitted the manner of service of his four and one-half years to the determination of the trial court.

In the sentencing hearing, the 41-year-old defendant testified that he wished to be placed in a rehabilitation program known as Hay House. He acknowledged that he had previously been on probation in Virginia and that the probation had been revoked.

The presentence report is not contained in the appellate record.[1]

The trial court found that the defendant had a previous history of criminal convictions and criminal behavior in addition to that necessary to establish Range II and that he had a previous history of unwillingness to comply with conditions of release into the community. *See* Tenn. Code Ann. § 40-35-114(2), (9) (2003). In mitigation of the HTO sentences, the court found that the offenses did not threaten serious bodily injury. *See id.* § 40-35-113(1). The court awarded slight mitigation for the defendant's truthfulness in reporting the amount he had drunk. *See id*. § 40-35-113(9). The court determined that the enhancement factors "far outweigh[ed]" the mitigating factors and ordered the four and one-half years at issue to be served in the department of correction.[2]

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[1]The transcript of the sentencing hearing recites that the report is appended as exhibit number one, but no report is present in the record.

[2]We note that the task at hand for the trial court was to determine the aptness of sentencing alternatives to confinement; the length of the defendant's sentences had previously been determined by the court's acceptance of the guilty plea agreement. In analyzing the issue at hand, the trial court reviewed all of the statutory sentence enhancement factors, *see* Tenn. Code Ann. § 40-35-114 (2003), and the mitigating factors, *see id*. § 40-35-113, which are commonly (continued...)

On appeal, the defendant claims the trial court should have granted an alternative sentence, such as a community corrections placement.

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The sentencing court must consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210(a), (b) (Supp. 2005); *id.* § 40-35-103(5) (2003).

De novo appellate review of the defendant's sentences is substantially hampered by the absence of the presentence report from the appellate record. As we have remarked on many occasions, it is the appellant's duty to include in the appellate record materials which are necessary to convey a fair, accurate, and complete account of what transpired in the trial court relative to the issues raised on appeal. *See* Tenn. R. App. P. 24; *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn.

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[2](...continued)
the bases for establishing the intra-range length of the sentence, *see id.* § 40-35-210 (d), (e). The trial court is correct that enhancement and mitigating factors impinge upon the alternative sentencing determination. *See id.* § 40-35-210(b) (in determining "the specific sentence *and the appropriate combination of sentencing alternatives*," the trial court shall consider, *inter alia*, "[e]vidence and information offered by the parties on the enhancement and mitigating factors") (emphasis added); *State v. Bolling*, 75 S.W.3d 418, 421 (Tenn. Crim. App. 2001) ("We disagree with the state's premise that the enhancement and mitigating factors are irrelevant when the sole issue before the court is the manner of service of a felony sentence."). We note, however, the trial court ordered four and one-half years' confinement because "the enhancing factors far outweigh" the mitigating factors and did not per se mention the factors for consideration in imposing confinement as set forth in Tennessee Code Annotated section 40-35-103(1). On the other hand, the two enhancement factors applied, "previous history of criminal convictions or behavior," Tenn. Code Ann. § 40-35-114(2) (2003), and "previous history of unwillingness to comply with the conditions of a sentence involving release in the community, " *id.* § 40-35-114(9), are very similar to Code section 40-35-103(1)'s factors of a necessity to protect society from a defendant with a "long history of criminal conduct" and of the frequent or recent, but unsuccessful, application of measures "less restrictive than confinement." *Compare id.* § 40-35-114(2) & (9) *with id.* § 40-35-103(1)(A) & (C).

1998). The presentence report is evidence which is considered by the trial court and therefore is necessary to convey a fair, accurate, and complete account of the proceedings below. *See* Tenn. Code Ann. § 40-35-210(b) (2003); *State v. Johnny Parker*, No. 03C01-9307-CR-00214 (Tenn. Crim. App., Knoxville, Nov. 22, 1994) (sentencing issue waived in absence of presentence report). In the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence. *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991); *State v. Summers*, 159 S.W.3d 586, 600 (Tenn. Crim. App. 2004), *perm. app. denied* (Tenn. 2005).

We observe, nevertheless, that as a Range II offender, the defendant did not appear before the trial court with a presumption of suitability for alternative sentencing. *See* Tenn. Code Ann. § 40-35-102(6) (2003). "As such, the state had no burden of justifying confinement through demonstrating the presence of any of the [Tennessee Code Annotated section 40-35-103(1)] considerations upon which confinement may be based." *State v. Joshua Webster*, No. E1999-02203-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Dec. 4, 2000). Thus, the burden was upon the defendant to justify any alternative sentence. *See* Tenn. Code Ann. § 40-35-103(1) (2003); *cf. State v. Zeolia*, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996) (when presumption of favorable candidacy for alternative sentencing options applies, state must justify confinement by showing "evidence to the contrary" of the presumption). Such was a difficult burden in the present case where, apart from the presentence report, which presumably showed the defendant's "long history of criminal conduct," Tenn. Code Ann. § 40-35-103(1)(A) (2003), the defendant's testimony in the sentencing hearing established a previous violation of probation.[3] Hence, the record that is before us establishes a basis for denying alternative sentencing. *See id.* § 40-35-103(1)(C) (confinement may be based, *inter alia*, upon a finding that "[m]easures less restrictive than confinement have . . . recently been applied unsuccessfully to the defendant").

In consideration of the foregoing, the judgments of the trial court are affirmed.

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JAMES CURWOOD WITT, JR., JUDGE

[3]The defendant's brief "concede[s] that he has been placed on probation previously for offenses and that on several of those occasions he was found to have violated the terms of his probation."